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COURT OF APPEALS

STATE OF NEW YORK

WELLS FARGO BANK, NATIONAL
ASSOCIATION AS TRUSTEE FOR OPTION ONE
MORTGAGE LOAN TRUST 2007-5, ASSET-
BACKED CERTIFICATES SERIES 2007-5,

Appellant, NO. 4

-against-

DONNA FERRATO,

Respondent.

20 Eagle Street
Albany, New York
January 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 4, Wells Fargo Bank
3 v. Ferrato.

4 Good afternoon, counsel.

5 MR. PANTALEO: Good afternoon. May it please the
6 court, Brian Pantaleo on behalf of the appellant, Wells
7 Fargo. I'd like to reserve three minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may have three minutes,
9 sir.

10 MR. PANTALEO: Thank you.

11 This appellant didn't slumber on its rights.
12 This appellant, through multiple actions, avidly tried to
13 enforce its rights and protect its secured interest in the
14 mortgage.

15 But the ground kind of moved underneath it,
16 having to file all of these actions. Whether it was, at
17 first, just the inconsistent positions in the earlier
18 actions that the respondent takes now, whether it was the
19 law of revocation kind of being undone, and all of a sudden
20 the court started looking at pretext, which was not a
21 requirement before - - - they started looking at what the
22 intent, like a mens rea almost, as to what the lender is
23 thinking when they're invoking a contractual right, a
24 contractual right that this court had recognized for over a
25 hundred years, or whether it was the strategy employed by



1 respondent to push this case further and further and
2 further, until we actually had a statute of lim - - -
3 limitations issue.

4 With the - - - respect to the first part, the
5 earlier actions, the 2009 and 2011 actions, the Supreme
6 Court in the 2011 action made a clear distinction. It
7 divided the - - - the case into two, or it divided the
8 mortgage instruments into two.

9 It said that there is a separate instrument, the
10 mortgage alone; and it's a separate instrument, the
11 mortgage with a modification. And foreclosure upon one is
12 not foreclosure upon the other.

13 It said it's not - - - they're not permitted to
14 foreclose on whatever they choose - - - whichever mortgage
15 instrument they choose. And that was a very, very
16 important distinction. And that distinction came after
17 Ferrato argued to that court that these were two separate
18 agreements that - - - that they were suing under the wrong
19 agreement - - - Wells Fargo was; that the agreement was
20 renegotiated; that the mortgage was amended and super - - -

21 JUDGE RIVERA: Judge, if I may ask a question?

22 CHIEF JUDGE DIFIORE: Judge Rivera, please.

23 JUDGE RIVERA: So counsel, if I'm understanding
24 your argument, given the position taken in a prior action,
25 your position is that the lender can proceed under the



1 original agreement or under the modification. Am I
2 understanding you correctly?

3 MR. PANTALEO: That was not the Supreme Court's
4 position. That was the position that was taken - - -

5 JUDGE RIVERA: No, no. I'm asking - - - I'm
6 asking you about the lender's position.

7 MR. PANTALEO: So this lender's position is
8 essentially that's what we had to deal with, because that's
9 what the Supreme Court said. I have seen no appellate law
10 that actually supports that case.

11 But that's what we relied upon, and that's what
12 the court found, because that's what Ferrato argued.

13 JUDGE RIVERA: Did - - - did - - - in the earlier
14 actions, weren't you proceeding on the agreement that
15 predates the modification, that is to say, the original
16 agreement?

17 MR. PANTALEO: Well, that's what the Supreme
18 Court - - - the Supreme Court didn't think that way. The
19 Supreme Court said these are two separate actions and
20 foreclosure - - -

21 JUDGE RIVERA: No, I'm asking you what the lender
22 was proceeding - - - I'm asking you.

23 MR. PANTALEO: Okay. Well, okay. So the lender
24 did not reference the modification.

25 JUDGE RIVERA: Okay.



1 MR. PANTALEO: And the lender - - -

2 JUDGE RIVERA: So the lender is then proceeding
3 under the first agreement, because you're not mentioning
4 the second one, right?

5 MR. PANTALEO: What the court - - - yeah, right.
6 The court said that there were two separate - - - the
7 Supreme Court said that there were two separate agreements,
8 so - - -

9 JUDGE RIVERA: That's a yes.

10 MR. PANTALEO: - - - determined that they were
11 proceeding on the fourth - - - on the first agreement, yes.
12 Or the - - -

13 JUDGE RIVERA: So and - - -

14 MR. PANTALEO: - - - wrong agreement, as Ferrato
15 said.

16 JUDGE RIVERA: - - - if that - - - if that is
17 what the lender is doing, how does that encourage debtors
18 and lenders to enter modifications?

19 MR. PANTALEO: If they're proceeding on the wrong
20 agreement, how does that encourage - - -

21 JUDGE RIVERA: Okay, so you're conceding now that
22 that would have been the wrong agreement?

23 MR. PANTALEO: No, I'm just conceding that that's
24 what the court said.

25 JUDGE RIVERA: Again, let me try it this way.



1 What is the agreement the lender was proceeding under?

2 MR. PANTALEO: The mortgage.

3 JUDGE RIVERA: The first - - -

4 MR. PANTALEO: The mortgage.

5 JUDGE RIVERA: There's a modification, is there
6 not?

7 MR. PANTALEO: Yes, there's also a modification.

8 JUDGE RIVERA: Okay, so does - - - what - - -
9 what impact, if any - - - let me try it this way - - - does
10 the modification have on the action - - - on the
11 proceeding?

12 MR. PANTALEO: Well, in - - - in this case, they
13 weren't allowed to introduce it. It was dismissed. The
14 complaint couldn't go forward. They wouldn't - - - there
15 was no answer or affirmative defense. The modification and
16 reformation are affirmative defenses.

17 The court didn't even let it get to that stage.
18 The court said this complaint just can't - - - can't be
19 moved forward. We - - - we - - - we can't go anywhere with
20 this. These are two separate and distinct instruments.

21 And it didn't grant leave to amend. Almost by
22 that reasoning, it couldn't have granted leave to amend,
23 because it said you didn't have the right instrument when
24 you filed.

25 Now, again, this is not - - - you know, this was



1 - - - this was - - - what became the law - - -

2 JUDGE RIVERA: But couldn't the lender - - -

3 MR. PANTALEO: - - - of the case.

4 JUDGE RIVERA: - - - so couldn't the lender file
5 the next day under the correct instrument, as the court saw
6 it.

7 MR. PANTALEO: Well, that's what the court did.

8 The - - - the - - - or that's what the lender did. The
9 lender went back and - - - and attempted to - - -

10 JUDGE RIVERA: And what - - -

11 MR. PANTALEO: - - - file with - - -

12 JUDGE RIVERA: - - - wait. How many proceedings
13 before the lender went back under the modification?

14 MR. PANTALEO: The next proceeding. The next
15 proceeding, which was the 2011 case. This was dismissed in
16 - - - in 2010, but you can't - - - there's all kinds of
17 notice requirements to - - - to file a foreclosure.

18 So this - - - this was something very distinct.
19 And the court was - - - the 2017 action, the order that's
20 actually on appeal, when the Supreme Court looked at this
21 order, it understood this in terms of the option contract
22 jurisprudence that had developed in the Appellate
23 Departments, Burke and its progeny.

24 And basically, if you have the wrong plaintiff
25 and you don't have standing or you're not a noteholder at



1 that point in time, then you can't accelerate the loan.
2 And that - - - that complaint is insufficient to do so.

3 Well, here you have a situation where you have
4 the wrong document - - - the wrong document, said by the
5 court, so you don't have standing - - - or - - - or you may
6 or may not have standing. We don't know, because it's - -
7 - it's actually the wrong document. And you can't proceed.

8 Again, the - - - that complaint, because it was
9 the wrong instrument, could not have accelerated the right
10 loan, so to speak.

11 JUDGE STEIN: Chief Judge, may I ask? May I
12 inquire?

13 CHIEF JUDGE DIFIORE: Judge Stein.

14 JUDGE STEIN: Counsel, are you aware of any other
15 reported cases that involve this situation where the court
16 said that the - - - that the lender was suing on the wrong
17 instrument as between an original mortgage and a
18 modification?

19 MR. PANTALEO: I do not. There are - - - there
20 is some case law out there that says if you reference the
21 modification, you can later introduce it into evidence.
22 It's more recent case law. I think it's out of the Second
23 Department.

24 But as far as a court saying, no, this is - - -
25 the - - - we - - - we were not going to accept this



1 complaint at the motion to dismiss stage, without even an
2 answer, you know, that - - - that's about it.

3 JUDGE STEIN: And - - - and you're arguing that
4 the court improperly denied your request to recognize an
5 effective revocation with regard to prior - - - the prior
6 actions, right?

7 When - - - when do you say that revocation was
8 effective? When did that take place? Was it when you made
9 the motion in Supreme Court in August 2017, or was it at
10 the time of the Supreme Court order in March of 2018?

11 MR. PANTALEO: It was at the time - - - so we - -
12 - we've spoken for a long time, and we've had four cases or
13 three cases before this that talk about a clear and
14 unequivocal act.

15 A clear and unequivocal act is when a lender's
16 attorney puts in an aff - - - affirmation, the basis of
17 this motion is to revoke acceleration. That's - - - that's
18 recorded. That's true to the world. Everybody can see it.
19 And that's at the point in time that - - - that everybody
20 should know.

21 And the court just started to look - - - this was
22 even before Milone, but this - - - this was the first
23 Supreme Court opinion that I'm aware of where the court
24 looked at this and said no, you can't revoke, in its order.
25 We're - - - we're going to accept that you're



1 discontinuing, but you, in capital letters, CANNOT revoke.

2 So again, our position is that pretext really
3 shouldn't matter. All that matters is that clear and
4 unequivocal act. And here you have it in August of 2017.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 JUDGE WILSON: Chief, if I might - - - Chief?

7 CHIEF JUDGE DIFIORE: Yes, Judge Wilson.

8 JUDGE WILSON: So counsel, I didn't see any
9 rationale as to why - - - why the court - - - so the
10 Supreme Court said you can't revoke. Was there any oral
11 discussion that would shed any light on that, what - - -
12 what the reasoning was?

13 MR. PANTALEO: I - - - I was not present at the
14 oral argument, but I - - - I do not understand - - - I
15 believe the argument was, hey, they just want to revoke
16 because they're going to avoid the statute of limitations.
17 And again, our position is pretext really shouldn't matter
18 here, as you have a clear and unequivocal act.

19 It's like any other contractual right. This is a
20 contractual right that's been recognized for a hundred
21 years by this very court.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. PANTALEO: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MS. SHERMAN: Good afternoon. May it please the



1 Court, Katherine Sherman for respondent Donna Ferrato.

2 As an initial matter, the facts of this case,
3 which I'm sure the court is - - - is very familiar with,
4 are slightly different from those that you've heard in the
5 prior cases. The bank, in this case, tried to foreclose
6 upon Donna - - - Mrs. Ferrato - - - five times, starting in
7 2008, and the last time being in 2017.

8 Over these ten years, the bank could not get it
9 right. The first action that they filed - - - the first
10 action that was filed actually was settled with a - - - a
11 loan modification agreement. Ms. Ferrato concedes that
12 that modification agreement was a revocation of the initial
13 acceleration of the loan.

14 However, again, in September of 2009, the bank
15 filed a second foreclosure action demanding that the entire
16 debt be paid. Accordingly, they accelerated the loan in
17 September 2009.

18 JUDGE STEIN: Chief, may I inquire?

19 CHIEF JUDGE DIFIORE: Yes, of course.

20 MS. SHERMAN: Yes, Your Honor.

21 JUDGE STEIN: Counsel, I - - - I'm a little
22 confused. You sought dismissal of the earlier actions
23 because they sued on the wrong instrument. And I assume by
24 that you meant you can't tell from the complaint what they
25 were - - - what amount they were requesting, or if you



1 could, it was the wrong amount.

2 So how does that constitute an unequivocal overt
3 act of acceleration, if that is true?

4 MS. SHERMAN: Well, Your Honor, there - - - there
5 was one mortgage here, and one piece of property that Ms.
6 Ferrato had a mortgage on with the bank. And in fact, both
7 the second and third foreclosure actions, although they did
8 not attach the modification agreement or refer to the
9 modification agreement, in Schedule E attached to both of
10 those complaints, they had the correct principal amount due
11 under the loan modification agreement.

12 JUDGE STEIN: Well, but they - - - they - - -
13 didn't they - - - by referring to the mortgage, that would
14 indicate one amount due, and by attaching Schedule E, that
15 would refer to a different amount due. To me that's the
16 quintessential equivocal act.

17 MS. SHERMAN: Well, it was clear that the bank
18 was demanding that Ms. Ferrato pay the full amount of her
19 loan or her house would be taken away from her. And you
20 know, the loan modification agreement, in and of itself,
21 refers back to the mortgage and the note. And there was no
22 indication for Ms. Ferrato that she wasn't going to lose
23 her home if she didn't pay the full amount due.

24 Now, there's a difference between the standard of
25 stating a claim for foreclosure, which is what we argued



1 the bank failed to do, and a difference between what
2 constitutes clear and unequivocal notice that the loan is
3 being accelerated. And - - -

4 JUDGE WILSON: Chief, if I might ask a question
5 there?

6 CHIEF JUDGE DIFIORE: Judge Wilson.

7 JUDGE WILSON: So - - - so when you said failure
8 to state a claim, why did the complaint fail to state a
9 claim? Was it because it was not the right mortgage
10 instrument that was sued on?

11 MS. SHERMAN: It was incomplete mortgage
12 documents. And so - - -

13 JUDGE WILSON: But that - - -

14 MS. SHERMAN: - - - it did not - - -

15 JUDGE WILSON: - - - that affects - - - that
16 affects what? Why is that - - - why is that - - - why is
17 the Supreme Court's decision correct?

18 MS. SHERMAN: Well, Judge Kenney decided in the
19 third action, and essentially because the bank had no
20 rebuttal to our argument that it didn't state a claim,
21 because it's incomplete mortgage documents.

22 And you know - - - and in a residential
23 foreclosure, the bank is held to specific standards of what
24 needs to be included in the summons and complaint to
25 foreclose upon the - - - the borrower. And here, the bank



1 just, on a technical error, didn't include all of the
2 mortgage documents.

3 But at no point did Ms. Ferrato understand that
4 the bank was going to continue to accept payments from her,
5 or at no point did they indicate that they were not
6 accelerating the entire mortgage that was due, the loan.
7 So it is our position that the loan was, indeed
8 accelerated, by the commencement of the second foreclosure
9 action.

10 Going to the court's second issue that I believe
11 it's been discussing all day regarding whether or not a
12 voluntary discontinuance constitutes a revocation of the
13 acceleration, not to cut down my colleagues who argued this
14 point previously, but factually in this case, it doesn't
15 matter.

16 If this court decides that a voluntarily
17 discontinued action automatically revokes the acceleration,
18 then it doesn't matter to Ms. Ferrato, because the bank
19 started a third foreclosure action in September 2011, two
20 years after it commenced the second action with the wrong
21 document attached, and failed, and that case was dismissed
22 on the merits, by the court.

23 So if you count from the third action, then the
24 fifth action filed in December 2017 is still time barred.
25 So that particular issue that's before the court today is



1 not relevant in the facts of the case that is Mrs.
2 Ferrato's.

3 Just to sum up, I would say Ms. Ferrato's been -
4 - - been dealing with the bank with this for over ten years
5 now. It - - - it's - - - it's really disingenuous for the
6 bank to come forward now and to suggest that Ms. Ferrato
7 had some grand scheme to - - - you know, to trick the bank
8 in some way.

9 It was the bank's repeated failures and
10 incompetence to pursue the foreclosure in the correct legal
11 manner, that have gotten them in the position that they are
12 now. And they've run out of time.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. SHERMAN: Um-hum.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. PANTALEO: Thank you. May it please the
17 court.

18 This was not a technicality, and this idea that
19 this was the wrong mortgage interest and the complaint
20 could not proceed came after, again, arguments made by
21 Ferrato and her counsel, that they were suing under the
22 wrong instrument, that the mortgage was amended and
23 superseded, not wrong documents - - - the mortgage was
24 amended and superseded by a later agreement con - - -
25 containing substantially different terms. That the



1 documents upon which the complaint relied upon were
2 incorrect, and more importantly, of no force and effect.

3 And that's - - - that's why they didn't
4 accelerate the loan. And if that was the case, in 2011 - -
5 -

6 JUDGE RIVERA: Judge, if I can ask - - -

7 MR. PANTALEO: - - - that was the case in 2009 as
8 well - - -

9 JUDGE RIVERA: - - - if I can ask - - -

10 MR. PANTALEO: I'm sorry.

11 JUDGE RIVERA: Counsel - - - no, that's fine.

12 So counsel, but I - - - I think her point is that
13 as you started saying over and over, you are indeed trying
14 to get paid. All she's saying is that it's yes, over and
15 over, you're trying to get paid the full amount, that that
16 was always what - - - what the lender was pursuing, even if
17 - - - I won't use her terminology - - - even if each time
18 there's a reason that the court stops them in their tracks.

19 That - - - what - - - the message that they
20 communicated, what they made clear, their - - - their
21 action was: we want the full debt paid. We're calling the
22 debt. Why isn't she right about that? That that's what
23 one draws from this record, if you look at indeed what the
24 lender did.

25 MR. PANTALEO: Because again, it was a different



1 document and a different set of loan instruments. And if
2 that was true, then that action should have been able to
3 proceed in 2011. It's as simple as that.

4 JUDGE RIVERA: Well, but there is - - -

5 MR. PANTALEO: We didn't need to - - -

6 JUDGE RIVERA: - - - you - - -

7 MR. PANTALEO: - - - we didn't want to file - - -

8 JUDGE RIVERA: - - - you - - - if I - - -

9 MR. PANTALEO: - - - five actions.

10 JUDGE RIVERA: - - - may interrupt? Do you then
11 take the position that the only way that you can accelerate
12 is by a - - - an action that is maintained at the court;
13 that if you make some technical error and it's dismissed,
14 that you haven't attempted to accelerate?

15 MR. PANTALEO: We take the position that this is
16 not a technical error nor a technical decision, that this
17 was a substantive - - -

18 JUDGE RIVERA: If - - - if the court - - -

19 MR. PANTALEO: - - - error and - - -

20 JUDGE RIVERA: - - - if the court disagrees with
21 you, do you lose?

22 MR. PANTALEO: If the - - - I'm sorry, with the
23 court - - -

24 JUDGE RIVERA: If the court disagrees and - - -
25 and sees it her way about the nature of this error, do you



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lose?

MR. PANTALEO: No, because if you look at option contract jurisprudence, there is an option, and you have to provide notice as to the option that you're accelerating from the correct document. They're different interest rates. They're different amount - - - they're different amounts under the different document.

And that is not clear - - - that - - - that is, like Justice Stein said, that's as unequivocal as you can get, when you're looking at two different amounts, and you have "the wrong document" as the Supreme Court found in 2011 and Ferrato argued vociferously to the - - - to the court at that point in time. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Wells Fargo Bank, National Association as Trustee for Option One Mortgage Loans Trust 2007-5, Asset-Backed Certificates, Series 2007-5 v. Donna Ferrato, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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